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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

WHIRLPOOL CORPORATION et al., Plaintiffs and Appellants, v. STATE BOARD OF EQUALIZATION, Defendant and Respondent.	A093374 (San Francisco County Super. Ct. No. 305143)

Plaintiffs Whirlpool Corporation (Whirlpool) and Chancellor Fleet Corporation (Chancellor) appeal from a judgment dismissing their complaint seeking a refund of a use tax paid under protest. They argue that the use tax does not apply because Whirlpool used Chancellor's property continuously in interstate commerce. We conclude the State Board of Equalization (the Board) did not wrongfully assess the use tax and, therefore, we affirm.

Facts

The matter was submitted to the trial court on a joint stipulation and exhibits regarding the relevant facts. Whirlpool is a Delaware corporation, with its principal place of business in Benton Harbor, Michigan, and is qualified and does business in California. Chancellor is a Massachusetts corporation with its principal place of business in Boston, Massachusetts.

During the tax period in question, July 1, 1988 through June 30, 1996, Whirlpool manufactured appliances in the Midwest and Asia. It had no manufacturing facilities in

California. Whirlpool set up a regional distribution center in Ontario, California, and leased trailer trucks, known as mobile transportation equipment (MTE), from Chancellor. Specifically, appliances were transported from Whirlpool's manufacturing site to Ontario, California under a bill of lading, which contained a storage in transit provision. The bill of lading indicated the recipient and purchaser of the appliances was the distribution center. The document did not list the ultimate destination for the products or the ultimate purchasers of the goods. After the appliances reached the distribution center, they were unloaded from cargo containers and distributed throughout the facility. Appliances remained in the distribution center for less than one day to up to one week. Warehouse employees organized the appliances and prepared them for shipment from the facility to the customers. As MTE came off the assembly line, it was dispatched to the distribution center in California to pick up goods already sold. Warehouse employees loaded the specific delivery into MTE for transportation from the distribution center to customers in California and other states.

The Board determined that Whirlpool's use of MTE from the distribution center to California customers was subject to the state's use tax. After paying the tax under protest, plaintiffs sued the Board for a refund. The trial court upheld the Board's imposition of the use tax. This appeal ensued.

Discussion

Our standard of review is de novo. We must "determine whether the Board in making the assessment in controversy has properly interpreted the relevant sections of the Sales and Use Tax Law and the Board's own relevant regulations adopted pursuant to such law. . . . 'The interpretation of a regulation, like the interpretation of a statute, is, of course, a question of law . . . , and while an administrative agency's interpretation of its own regulation obviously deserves great weight . . . , the ultimate resolution of such legal questions rests with the courts. . . .'. [Citations.] . Therefore, giving the appropriate weight to the Board's interpretation," we must determine whether Whirlpool's use of MTE in California is subject to taxation "within the meaning of the applicable provisions

of the Sales and Use Tax Law and [the] regulations promulgated thereunder." (*Culligan Water Conditioning v. State Bd. of Equalization* (1976) 17 Cal.3d 86, 93, citations and fn. omitted.)

California imposes an excise tax on the use of tangible personal property in the state, wherever purchased, unless the transaction is otherwise exempted by statute or state or federal constitution. (See Rev. & Tax. Code, § 6201 et seq.; *Flying Tiger Line v. State Bd. of Equal.* (1958) 157 Cal.App.2d 85, 98.) Plaintiffs concede that the Commerce Clause of the United States Constitution does not bar the taxing of Whirlpool's use of MTE in California. (See *Complete Auto Transit, Inc. v. Brady* (1977) 430 U.S. 274, 288.) Moreover, plaintiffs do not cite any federal or state law or other federal or state constitutional provision that specifically exempts MTE from California's use tax.

Plaintiffs argue, however, that the Board is precluded from assessing the use tax because of its enactment of regulations, codified at title 18 of the California Code of Regulations (the regulations), and an annotation in its Taxes Law Guides, which purportedly exempt MTE from the use tax.[1] We disagree. The Board may not issue a regulation giving a broader exemption from taxation than permitted by statute. (See *Western Pac. R. R. Co. v. State Board of Equalization* (1963) 213 Cal.App.2d 20, 28; *Atchison etc. Ry. Co. v. State Bd. of Equal.* (1956) 139 Cal.App.2d 411, 415 fn. **.) The regulations, and any annotation interpreting the regulation, must be read only as giving effect to the exemptions provided by law. (*Ibid.*; see *Yamaha Corp. of America v. State*

[1] Plaintiffs rely on (1) section 1620 of the regulations, which provides that the use tax does not apply to "property purchased for use and used in interstate or foreign commerce prior to its entry into this state, and thereafter used continuously in interstate or foreign commerce both within and without California and not exclusively in California" (The regulations § 1620, subd. (b)(2)(B)(1)); and (2) an annotation in the Board's Taxes Law Guides representing during the tax years in question the Board's interpretation of section 1620. The annotation was subsequently removed from the Board's Taxes Law Guides in January 1999. Additionally, in section 1661 of the regulations, the Board has taken the position that MTE is exempt from the use tax where "the equipment enters the state in

Bd. of Equalization (1998) 19 Cal.4th 1, 15; *La Societe Francaise v. Cal. Emp. Com.* (1943) 56 Cal.App.2d 534, 553-554.) In any event, we agree with the Board that the regulations and the annotation in question do not address the factual circumstance herein, namely the use of MTE, which is brought into the state, ending its interstate transit journey at a distribution center, and then used to transport goods from the distribution center to California customers.

Plaintiffs' reliance on federal cases involving the Interstate Commerce Commission (ICC)'s interpretation of whether transportation is in interstate commerce under the Interstate Commerce Act is similarly misplaced. Contrary to plaintiffs' implicit argument, "there is no single, dispositive reading of the law" governing the interstate nature of transportation used in distributions systems, such as the type used by Whirlpool. (*State of Texas v. United States* (5th Cir. 1989) 866 F.2d 1546, 1565 [conc. & dis. opn. of Higginbotham, J.].) In any event, the issue in the ICC cases was not whether the courts "would construe the precedents as the ICC did, but whether [the ICC's] construction [was] a tenable one." (*State of Texas v. United States*, *supra*, 866 F.2d at pp. 1556-1557; see *International Broth. of Teamsters v. I.C.C.* (9th Cir. 1990) 921 F.2d 904, 907-908 [ICC's interpretation of whether goods in continuous interstate commerce upheld as rational].) Plaintiffs do not cite any cases that hold the ICC's interpretation of "continuous interstate commerce" governs the taxing of the use of MTE in this state. We believe the applicable federal and state cases hold just the opposite: The interstate nature of the transaction does not preclude the imposition of the use tax in this case. (See *Complete Auto Transit, Inc. v. Brady, supra*, 430 U.S. at p. 288; *Atchison etc. Ry. Co. v. State Bd. of Equal., supra*, 139 Cal.App.2d at pp. 414-424.)

We conclude therefore that Whirlpool's use of MTE to deliver appliances from the California distribution center to California customers is subject to taxation.

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interstate commerce and is used continuously thereafter in interstate commerce." (The

Disposition

The judgment is affirmed.

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McGuiness, P.J.

We concur:

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Corrigan, J.

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Parrilli, J.

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regulations § 1661, subd. (b)(1).)